FILE COPY

JAMES R. BROWNING

No. 784

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEONARD GARFINKEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and Rule involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Cases:

Banks v. *United States*, 239 F. 2d 409, certiorari denied, 353 U.S. 960	7
Goto v. *Lane*, 265 U.S. 393	7
Marteney v. *United States*, 216 F. 2d 760	8
Martyn v. *United States*, 176 F. 2d 609	7
McGann v. *United States*, 249 F. 2d 431, certiorari denied, 356 U.S. 923	7
Sunal v. *Large*, 332 U.S. 174	9
Tarkington v. *United States*, 194 F. 2d 63	9
United States v. *Brown*, 246 F. 2d 541	8
United States v. *Greathouse*, 170 F. 2d 512	7
United States v. *Karavias*, 170 F. 2d 968	9
United States v. *Schwenke*, 221 F. 2d 356	9
United States v. *Visconti*, 261 F. 2d 215, certiorari denied, 359 U.S. 954	9
United States v. *Wiley*, 267 F. 2d 453	9
United States v. *Williams*, 254 F. 2d 253	9
Wright v. *United States*, 172 F. 2d 310	7

Statutes and Rules:

	Page
18 U.S.C. 2314	2, 3, 7
28 U.S.C. 2255	8
Rule 30, F.R. Crim. P	8
Rule 32, F.R. Crim. P	2
Rule 32(c)(1), F.R. Crim. P	2, 4, 9

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 284 F. 2d 548.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1960 (Pet. App. 7a). A petition for rehearing was denied on February 7, 1961 (Pet. App. 8a–9a). The petition for a writ of certiorari was filed on March 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether money orders, imprinted with a stamp stolen from the purported issuer, were "falsely made" and "forged" within the meaning of 18 U.S.C. 2314, even though petitioner had signed them as sender with his true name.

2. Whether petitioner, who failed to take a timely appeal, may attack the court's charge.

3. Whether the court after denying a motion for probation could properly impose sentence without ordering a presentence investigation report.

STATUTE AND RULE INVOLVED

18 U.S.C. 2314 provides in pertinent part as follows:

* * * * *

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited;
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

Rule 32 of the Federal Rules of Criminal Procedure provides:

* * * * *

> (c) *Presentence Investigation.*
>
> (1) *When made.*—The probation service of the court shall make a presentence investigation and report to the court before the imposi-

tion of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.*—The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

* * * * *

STATEMENT

Petitioner and two others were charged in an indictment returned in the United State District Court for the Northern District of Illinois in nine counts with unlawfully transporting and causing to be transported in interstate commerce nine separate falsely made and forged American Express Company money orders of $50 each, knowing the same to have been falsely made, forged, and counterfeited, in violation of 18 U.S.C. 2314 (R. 2–20). The tenth count charged a conspiracy to commit the foregoing offenses (R. 20). Petitioner was tried alone (R. 31), and the jury found him guilty as charged (R. 96). He was sentenced to imprisonment for a period of two years (R. 96–97). A notice of appeal from the conviction was filed later than the 10-day period for an appeal, after which the appeal was dismissed on motion of the government (R. 98–99, 113–114).

Petitioner then filed (1) a motion for vacation of judgment and sentence and for correction thereof under Rules 35 and 12(b)(2), F.R. Crim. P., alleging primarily that the indictment on its face failed to charge a criminal offense; and (2) a motion to correct and vacate sentence under Rule 35, alleging that the court failed to use the presentence investigation procedure of Rule 32(c)(1) (R. 102–113). These two motions were overruled on March 17, 1960 (R. 115–116), and petitioner appealed from this judgment (R. 116–117). The court of appeals affirmed the judgment (Pet. App. 7a).

Pertinent evidence adduced at the trial may be summarized as follows:

1. On each of the nine American Express $50 money orders involved in the indictment, the petitioner signed his name as sender and wrote in the name Lenmark Associates, Inc. (petitioner's corporation) as the payee. He then deposited the money orders to the credit of the corporation in a Chicago bank, and the bank forwarded the money orders to New York for payment by the American Express (R. 3, 5, 7, 9, 11, 13, 15, 17, 19). The money orders in counts 2 through 9 bore stamped impressions reading "Glickman—5247 CL," which stamp identified Glickman's Drug Store in Cleveland, Ohio, a subagent of the American Express Company, as the purported issuer of the money orders (see, *e.g.*, R. 11). There was no dispute that the money order blanks had been stolen and that the Glickman stamp had been affixed with a machine stolen in a burglary of the drug store (R. 31–32).

The principal prosecution witness was co-defendant

Kennedy, who later pleaded guilty (R. 122–123). Kennedy testified that on September 3, 1958, he telephoned the petitioner, from whom he had borrowed money in previous transactions, saying that some people had checks they wanted to "get rid of". Petitioner said he "could handle them * * * at a price * * *" (R. 33). Kennedy obtained from the co-defendant McIntosh 22 blank $50 money orders, totaling $1,100 (R. 33–34). Petitioner asked Kennedy to sign the money orders, but Kennedy refused to do so since he knew they had been stolen and told petitioner that they had been stolen (R. 35, 37). Petitioner then signed all the blank money orders and deposited them in the corporate bank account of Lenmark Associates (R. 35, 43, 47, 59). Petitioner told Kennedy to sign any name to a loan record he wanted to keep, and Kennedy signed "John Robinson". Petitioner then gave Kennedy $450. Petitioner also made out a check for $1,050 payable to John Robinson (Gov. Ex. 24), and had Kennedy endorse it in the name of John Robinson (R. 35, 38). According to Kennedy, petitioner kept the check (R. 35).

When an agent for the American Express Company notified petitioner that the money orders had been stolen in blank, petitioner said that he had received them as collateral for a loan made to a man, sent to him by a friend, whom he had not known before. Petitioner reimbursed the company (R. 40–41). When interviewed by an F.B.I. agent, petitioner first said that he had obtained the money from a man named Robinson, but, after consulting with his

partner, a lawyer, petitioner changed his story, saying he had obtained the money orders from Kennedy (R. 44–45).

2. After denial of a defense motion for acquittal, this colloquy occurred (R. 86–87):

> Mr. GORMAN: (defense counsel): * * * Would your Honor order a presentence investigation?
>
> The COURT: Well, I will hear you on a motion for probation, if you care to make one. I will hear you orally. I have heard the defendant's history from him on the stand, and if at this time you care to make a motion for probation, I will certainly hear anything you care to say or to offer in support of it.

Counsel spoke in support of the motion for probation, pointing out the petitioner's prior history as a law-abiding citizen and the fact that he had made restitution (R. 87). Then this discussion occurred (R. 88):

> The COURT: I want to read [the F.B.I. report of the investigation] and you rely on your motion for probation on what you have just said with reference to the record already.
>
> Is there anything else that you want to submit?
>
> Mr. GORMAN: No. I do not believe that there is anything further that I could submit.

At the resumption of the hearing the following afternoon defense counsel again spoke in favor of probation (R. 89–91). In denying the motion, the court observed, "I have carefully considered the motion and have carefully reviewed the evidence which you have submitted in support of your motion, principally the

evidence which was adduced on the trial, and have also read carefully a report of the F.B.I. last evening. * * * I feel, considering all of the factors in this case, this is not a case for probation. * * *" (R. 92).

ARGUMENT

1. Contrary to the petitioner's contention (Pet. 6–7, 20–22), the indictment did state federal offenses under 18 U.S.C. 2314 (*supra*, p. 2) and the evidence showed that such offenses had been committed. The use of the forged Gliekman stamp on the American Express money orders clearly made them forged and falsely made instruments since they were not, as they on their face purported to be, issued by a subagent of the American Express Company under its authority.[1]

Irrespective of the correctness of the "true name" decisions, cited by the petitioner as being in conflict with the decision below, those cases are distinguishable from the case at bar. In *United States* v. *Greathouse*, 170 F. 2d 512 (C.A. 4), *Wright* v. *United States*, 172 F. 2d 310 (C.A. 9), and *Martyn* v. *United States*, 176 F. 2d 609 (C.A. 8), a check was drawn by

[1] The sufficiency of an indictment is not open on collateral attack unless it is so obviously defective that under no reasonable construction can it be said to charge the crime for which sentence is imposed. *Goto* v. *Lane*, 265 U.S. 393; *McGann* v. *United States*, 249 F. 2d 431 (C.A. 4), certiorari denied, 356 U.S. 923; *Banks* v. *United States*, 239 F. 2d 409 (C.A. 7), certiorari denied, 353 U.S. 960. Since the indictment here did charge federal offenses and was not defectively stated, the holding by the court below that it was not subject to collateral attack was correct. The present proceeding is collateral since petitioner did not take a timely appeal.

the maker on an existing bank in which he had no funds. Similarly, in *Marteney* v. *United States,* 216 F. 2d 760 (C.A. 10), the warehouse receipts involved were themselves genuine, but the warehouse did not have grain in storage represented by the receipts. In *United States* v. *Brown,* 246 F. 2d 541 (C.A. 2), genuine drafts executed by the defendant as the true maker were not "falsely made" under the statute, even though he obtained payment on them by other falsely made documents. In all of those cases the instrument involved was exactly what it purported to be and had been executed by the defendant as the true maker; no part of the instrument was forged or spurious. In the instant case, however, even though the petitioner signed the money orders as sender with his true name, they were not what they purported to be. They purported to be money orders sold by Glickman as subagent, but they were not, since Glickman's stamp had been stolen and forged on them.

2. Petitioner contends that in summarizing the indictment (Appendix E, Pet. App. 13a–14a), the court's omission to inform the jury that he was charged with causing the transportation of the money orders knowing that they had been "falsely made, forged and counterfeited," constituted reversible error (Pet. 23–24). The full charge is not included in the record. Not only is this issue precluded by the failure of petitioner's counsel to make an objection before the jury retired to consider its verdict, as required under Rule 30, F.R. Crim. P. (Pet. App. 12a), but it is not a basis for attack under 28 U.S.C.

2255 or a motion to correct sentence. See *Sunal* v. *Large*, 332 U.S. 174. Indeed, the point was not raised even in the motions to vacate sentence (R. 102–110) or in the briefs in the court of appeals.

3. There is no merit to the petitioner's contention (Pet. 24–25) that the court erred in imposing sentence without requiring a presentence investigation under Rule 32(c)(1), F.R. Crim. P. (*supra*, p. 2). Under the language of Rule 32(c)(1), a presentence report is not mandatory; its use is within the discretion of the trial judge. *E.g.*, *United States* v. *Visconti*, 261 F. 2d 215, 217 (C.A. 2), certiorari denied, 359 U.S. 954; *United States* v. *Schwenke*, 221 F. 2d 356, 358 (C.A. 2); *United States* v. *Williams*, 254 F. 2d 253, 254 (C.A. 3); *United States* v. *Karavias*, 170 F. 2d 968, 971–972 (C.A. 7); *Tarkington* v. *United States*, 194 F. 2d 63, 68 (C.A. 4).

This is not a situation similar to that involved in *United States* v. *Wiley*, 267 F. 2d 453 (C.A. 7), upon which petitioner relies, where the sentencing court erroneously refused to consider a motion for probation of an accused who stood trial instead of pleading guilty. Here the court entertained the oral motion for probation and gave the petitioner and his counsel every opportunity to make whatever statements they thought advisable prior to sentencing (R. 86–93). He specifically asked the petitioner if he wished to speak and petitioner did so (R. 93). In his later motion to correct sentence, petitioner urged that the failure to have the regular presentence investigation resulted in the non-disclosure of his poor physical condition and that of his wife and child (R.

108–110). Petitioner and his counsel could have divulged this information at the hearing on the motion for probation, but did not do so. Neither did they make any objection at that time to the court's consideration of the F.B.I. report nor request inspection of it. It seems evident that the judge wished to predicate his sentence on the facts relating to petitioner's participation in the crime charged and for that reason wished to consider, in addition to the evidence at the trial, all the circumstances surrounding the crime including facts relating to the participation by persons not on trial which would not be developed at the trial. Petitioner, who did not object at the time of sentencing, thus would have had no basis to complain of the procedure followed on direct review. He clearly cannot show that sentence was illegally imposed.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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